BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID K. HOWARD Claimant	)	
VS.	)	
INNOVIA FILMS, INC. Respondent	)	Docket No. 1,060,317
AND	)	
NEW HAMPSHIRE INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier requested review of the August 30, 2012, preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) denied respondent's request seeking discontinuation of claimant's workers compensation benefits which were being provided pursuant to a June 6, 2012, preliminary hearing Order. In that Order, the ALJ determined claimant was entitled to temporary total disability and medical treatment benefits for his work-related repetitive trauma injuries.[1]

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 29, 2012, Preliminary Hearing and the exhibits and the transcript of the June 5, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

[1] Claimant's Application for Hearing alleged a series of repetitive traumas "commencing 3/2/12 and continuing through 3/8/12." Form K-WC E-1, Application for Hearing, filed April 5, 2012.

ISSUES

Respondent asks that the Board reverse the ALJ's Order, arguing that claimant did not prove he suffered an accidental or repetitive trauma injury that arose out of and in the course of his employment and that claimant's alleged work-related injury is not the prevailing factor in causing his current medical condition. Respondent contends claimant either suffered a distinct injury while assisting his daughter move and suffered no injury at work or claimant's injury while assisting his daughter's move was an intervening injury.

Claimant asks that the Board affirm the ALJ's Order, arguing that the evidence presented at the August 29, 2012, preliminary hearing was insufficient to rebut claimant's evidence that he injured his low back while performing repetitive work while employed at respondent. Claimant further asserts that he did not suffer an intervening injury and that if there was some worsening of claimant's work injury as a result of his helping his daughter move, the worsening was "trivial" compared to his work-related low back injury.

The issues for the Board's review are:

(1) Did claimant suffer a repetitive trauma injury that arose out of and in the course of his employment with respondent?

(2) Is claimant's alleged work-related injury the prevailing factor in causing claimant's current medical condition and need for treatment?

(3) Did claimant suffer an intervening injury?

FINDINGS OF FACT

Claimant began working for respondent in June 2005. In March 2012, he was working 12-hour shifts as a slitter. Respondent made cellophane. The rolls of cellophane are 60 inches wide, and claimant operates a machine that cuts and separates the cellophane from a large roll into small rolls. Claimant said all throughout his shift he would cut cellophane, put it on cores, take cores off the machine after they are filled, and put new cores back into the machine.

Claimant testified that he was working the weekend of March 2, 3 and 4, 2012. During that weekend, respondent ran a bunch of bad cellophane and he was required to perform a lot of cutting and taping in order to splice the cellophane. He said in doing so, he was constantly bending, twisting and lifting. He is claiming an injury to his low back from his repetitive work actions from March 2 through 8, 2012.

Claimant testified that by the end of the weekend, his back was aching. Claimant said on Sunday, March 4, about an hour before the end of his shift, claimant's lead worker, Keith Howard, came around, and claimant told Mr. Howard that his back was killing him.

Claimant thought a coworker, David Hackett, was standing next to him when he made the comment about his back to Mr. Howard. When claimant got off work on March 4, he immediately went to his parent's house and got in their Jacuzzi tub and then laid down on the floor with a pillow under his back.

Claimant said he was not scheduled to work on March 5 and 6. Claimant did not make any complaints to his employer about his back on either March 5 or 6. He next worked on March 7 and 8. Although he continued to have problems with his low back on the 7th and 8th, he worked his entire shift and made no complaints to respondent. He said his back did not get any worse or any better on March 7 and 8. He had regularly scheduled days off on March 9, 10 and 11.

On March 12, before going to his job on the night shift, claimant helped his daughter move five pieces of furniture from her mother's home to her duplex. He said the heaviest thing he moved was a couch, which he and his daughter moved. Claimant denied suffering a new injury while helping his daughter move the furniture.

Claimant testified that he just thought he had a back ache, and after he helped move his daughter's furniture, he called in to work to report that he would not be at work that evening. Claimant testified that he reported to the shift manager that he would not be in because his back was sore, and he also said that he had just gotten back from helping his daughter move. He did not say that his back was sore from helping his daughter move. Neither did he say that he had hurt his back while at work at respondent. Claimant called in again on March 13, 2012, again reporting that he would not be at work because his back was sore. March 14 and 15 were claimant's regular off-duty days, and he was hoping that after those two days, he would be well enough to work on Friday, March 16.

On March 16, 2012, claimant got a telephone call from Cheryl Elder, respondent's benefits manager, telling him that an appointment had been made for him with the company doctor. Claimant saw Dr. Dale Garrett on March 16. Claimant testified that he told Dr. Garrett about the bad batch of cellophane and that his back began aching at work during the period from March 2 through March 8, 2012. Claimant said he also told Dr. Garrett about the hot tub and the pillow and about later helping his daughter move. He denied telling Dr. Garrett that he thought he had hurt his back helping his daughter move or that moving her furniture made his back worse. Dr. Garrett's medical note of March 16, 2012, does not mention claimant's claims of his back aching from his work on March 2 through 8. Dr. Garrett's note indicated that claimant's back pain had been present since March 12, 2012, and that on March 12 claimant had been carrying furniture while helping his daughter move.

Dr. Garrett concluded that claimant's back problem was not related to his work activities. He put claimant on modified duty and gave claimant restrictions that lifting, pushing and pulling should be limited to 20 pounds or less with no prolonged or repetitive bending or twisting at the waist. Claimant was not allowed to return to work with those

restrictions. He filled out an application for short term disability and indicated on the paperwork that his condition was work related. His application for short term disability was denied.

After seeing Dr. Garrett, claimant tried to make an appointment with his personal physician, Dr. Loree Cordova. She was not available at the time, so on March 20, 2012, claimant saw another physician in her medical group, Dr. Dan Severa. Claimant told Dr. Severa he noticed his back was aching around March 4, 2012. He testified he told Dr. Severa that his back pain was related to his work. Dr. Severa's medical note of March 20, 2012, states, "Current symptoms: Lifting furniture before it started."[2] Claimant denied telling Dr. Severa that he had been lifting furniture before his pain started. Claimant saw Dr. Cordova on April 12, 2012. Dr. Cordova's notes of that date indicate claimant said his back was still sore, stiff and achy but better than it was on March 4 when he had a lot of pain.

Claimant was seen on May 22, 2012, by Dr. Pedro Murati. Claimant told Dr. Murati that after working with a bunch of bad cellophane for an entire shift, he had pain in his low back. Dr. Murati examined claimant and diagnosed him with low back pain with signs and symptoms of radiculopathy. Dr. Murati opined that claimant sustained multiple repetitive traumas at work that resulted in low back pain and that the repetitive traumas and subsequent lack of appropriate medical treatment were the prevailing factor in the development of claimant's condition.

David Hackett testified that he is claimant's friend and coworker. He performed the same job at respondent as did claimant. Mr. Hackett said that when working with bad cellophane, there would be a lot of bending, twisting, and stooping. Mr. Hackett said at some point he became aware of claimant's back condition. He said he did not hear about claimant's back problems until a week or so after they worked with the bad cellophane, which would have been about the time claimant helped his daughter move. Mr. Hackett said at first claimant said he was not sure whether he had hurt his back at work or when he was helping his daughter move.

Richard Seelbach testified that he is respondent's finishing day supervisor. He supervises four shifts and is claimant's supervisor. When claimant called in on March 12, 2012, to say he would not be at work, he spoke with another supervisor, not Mr. Seelbach. When Mr. Seelbach looked at the reports on March 13, he noted that claimant had called in on March 12. Because the report gave no indication why claimant had called in, Mr. Seelbach noted on his records that claimant was sick. Mr. Seelbach spoke with claimant on March 13, 2012. Mr. Seelbach testified that claimant told him he had hurt his back moving his daughter and would not be at work on March 13. On March 13, Mr. Seelbach noted in his records that claimant called in again and that claimant had hurt his back while

[2] P.H. Trans. (June 5, 2012), Cl. Ex. 2 at 10.

moving his daughter. At no time did claimant mention that he had injured his back while working. If claimant had so stated, Mr. Seelbach would have contacted the human resources department.

Nancy Howard, claimant's mother, testified that she was aware in early March 2012 that claimant was having problems with his back. She said claimant would come to her house and lie on the floor every night and would frequently use their hot tub. Mrs. Howard said that when claimant called in to work on March 12 and 13, he called from her home. She said claimant never told anyone in those conversations that he had hurt his back moving his daughter. All he said was that he could not go in because his back was still hurting. She said she did not even know that claimant had helped move his daughter.

Cheryl Elder is the benefits administrator at respondent. Per company policy, she scheduled an appointment for claimant with Dr. Garrett after claimant had taken off work a couple of days because he had hurt his back while helping his daughter move. Ms. Elder said respondent wanted to see if it was okay for claimant to come back to work or if he needed to be off longer. Claimant was not sent to Dr. Garrett because respondent thought he had a workers compensation injury. When Ms. Elder called claimant to tell him about the doctor's appointment, claimant did not report any work-related injury to her.

Ms. Elder said when claimant finished his appointment with Dr. Garrett, he returned to the plant and they spoke about Dr. Garrett's restrictions. Ms. Elder said respondent does not accommodate work restrictions unless they are a result of a workers compensation situation. Ms. Elder told claimant that respondent would get him the short-term disability paperwork. Claimant did not say anything to Ms. Elder during this conversation about having had a work-related injury. Ms. Elder said she asked claimant about his back, and he replied, "I really tweaked my back moving my daughter."[3]

Ms. Elder said that normally employees return the short-term disability paperwork to her, but claimant sent the paperwork directly to respondent's disability carrier. Ms. Elder received a telephone call from the insurance carrier telling her that when claimant filled out the paperwork, he had indicated that his condition was work related.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

[3] P.H. Trans. (Aug. 29, 2012) at 17.

to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . . .
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> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[4]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

The ALJ found that claimant suffered repetitive trauma injuries at his job with respondent on March 2, 3, 4, 7 and 8, 2012, and that his work activities were the prevailing

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[4] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2011 Supp. 44-555c(k).

factor in causing the claimant's back injury, his need for medical treatment, and his temporary total disability. In determining what was the primary or prevailing cause of claimant's back injury, it is useful to look at the chronology of claimant's symptoms and complaints.

Claimant testified that his symptoms began during his work shifts on March 2, 3 and 4, 2012, and in particular during his shift on March 4, 2012. Claimant said he reported to his supervisor, Keith Howard, that his back was killing him and that a coworker, David Hackett, was also present. Keith Howard did not testify, but another supervisor, Richard Seelbach, testified that when a worker reports a work injury he contacts respondent's human resources department. This was not done on March 4, 2012. David Hackett testified that he did not become aware of claimant's back injury until about a week after the weekend of March 2, 3 and 4.

Claimant was not scheduled to work on March 5 and 6. Claimant worked his regular shift on March 7 and 8. And although claimant said his back was bothering him, claimant did not voice any complaints and did not report an injury. Claimant was not scheduled to work again until March 12, 2012. Before his shift was to have begun, claimant helped his daughter move. In doing so, claimant lifted several items of furniture, including a couch. Although claimant denies injuring himself during this move, he called work and said he could not come in because his back was sore. He also said that he had just gotten done helping his daughter move. Claimant called work again on March 13 and spoke with Mr. Seelbach. Mr. Seelbach testified that claimant told him he could not work that day because he had hurt his back moving his daughter. Claimant did not mention a work-related injury. Claimant admits that he did not report hurting his back at work when he called in on March 12 and March 13.

Claimant spoke with respondent's benefits manager, Cheryl Elder, on March 16, 2012. She was concerned about claimant's back and scheduled him to be examined by respondent's company physician, Dr. Garrett. Ms. Elder testified that it was her understanding claimant had injured his back helping his daughter move. Claimant did not tell her that his back injury was work related.

Claimant saw Dr. Garrett on March 16, 2012. Claimant testified that he told Dr. Garrett that his back started hurting him at work, but Dr. Garrett's notes from that visit do not mention claimant's work. Dr. Garret's notes only mention claimant carrying furniture while helping his daughter move. Dr. Garrett concluded that claimant's problems were not work related.

Claimant saw Dr. Severa on March 20, 2012. Again, claimant said that he told Dr. Severa about his work activities on March 4, 2012, causing the onset of his pain. Dr. Severa's notes mention the March 4th date but show claimant's current symptoms to be the result of lifting furniture. Work activities on March 4, 2012, were mentioned in Dr. Cordova's notes of April 12, 2012, however.

Claimant was sent by his attorney to Dr. Murati on May 22, 2012. Dr. Murati's report contains a history of back symptoms due to work. Dr. Murati was not given a description of the furniture moving immediately preceding claimant's first time missing work. As such, Dr. Murati related claimant's back pain to claimant's work. Claimant's mother, Nancy Howard, also testified that claimant's back symptoms started when he was working in early March 2012. She was unaware of claimant having helped his daughter move.

When claimant met with respondent's benefits manager after his examination by Dr. Garrett and she told him Dr. Garrett's restrictions would not be accommodated by respondent unless they were work-related, claimant still did not tell Ms. Elder that his injury was work related. Instead, claimant said that he tweaked his back moving his daughter's furniture. It was not until claimant filled out the forms for short-term disability that he reported the cause of his back condition to be from his work.

There is no question but that claimant has a physically demanding job, a job that was made more physically demanding the weekend of March 2-4, 2012, when the cellophane machines were malfunctioning. Nevertheless, if claimant's back symptoms began that weekend, claimant did not make that clear to anyone at the time. Moreover, when claimant did describe the cause of his back condition to his supervisor, respondent's benefits manager and to both of the first two doctors he saw, what they all understood him to say was that he injured his back moving furniture for his daughter.

Based on the record presented to date, the undersigned Board Member finds that the greater weight of the credible evidence is that the prevailing factor causing claimant's back injury was moving his daughter's furniture on March 12, 2012.

CONCLUSION

The prevailing factor in causing claimant's current disability and need for medical treatment was the lifting and moving of furniture on March 12, 2012. Therefore, workers compensation benefits should be denied.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated August 30, 2012, is reversed and workers compensation benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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